UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAMILTON EXHIBITION, LLC,

Plaintiff,

- against -

IMAGINE EXHIBITIONS, INC. and TOM ZALLER,

Defendants.

19 Civ. 1470 (LLS)

OPINION & ORDER

Plaintiff Hamilton Exhibition, LLC ("Hamilton Ex") brought this diversity action against Defendants Imagine Exhibitions, Inc. ("IEI") and Tom Zaller alleging claims of fraud, negligent misrepresentation, breach of contract, and unjust enrichment in connection with the production of a museum exhibition. Defendants move to dismiss the complaint. For the reasons that follow, the motion to dismiss the complaint is granted in part and denied in part.

BACKGROUND

The following facts are as alleged in the Complaint (Dkt. No. 1).

Following the highly-acclaimed reception of the Broadway musical *Hamilton: An American Musical* ("*Hamilton*"), its producers decided to create a museum-style exhibition based on the musical show, educating visitors about the American Revolution and the life of Alexander Hamilton.

Plaintiff Hamilton Ex is a New York limited liability

company that was organized to create the Exhibition.

Defendant IEI is a Georgia limited liability company that designs, produces, markets, and operates exhibitions in museums and non-traditional venues. Defendant Tom Zaller is the President and Chief Executive Officer of IEI and is a citizen of Georgia.

In mid-2016, Hamilton Ex brought in two exhibition companies to interview for the role of production manager of the Exhibition, one of which was IEI. Mr. Zaller attended the interview.

During their interview, Defendants claimed to be experts in the production of exhibitions with "25 years of diverse experience in the museum and entertainment industries" and who could "take broad concepts and translate them into concrete realities." Defendants also represented that they had the experience, expertise, capabilities, contacts, and staff to prepare an accurate and detailed narrative script; create a set of usable drawings; oversee the Exhibition within a proposed budget; obtain historic artifacts and other objects referenced in *Hamilton*; identify and secure a museum venue in Chicago; negotiate with, contract with, and manage third-party vendors; manage the marketing budget; and manage the Exhibition's day-to-day operations and installation.

In October of 2016, Hamilton Ex retained and paid IEI to

serve as the production manager of the Exhibition.

Defendants represented that IEI was able to draft the Exhibition's written content, including a narrative script, on a timely basis. However, IEI's written work for the narrative script was chronically late, incomplete, and factually inaccurate. Hamilton Ex retained a Yale University history professor who said that IEI's research appeared to rely on first-page Google results and that IEI did not have a qualified team that could provide proper written content. Another expert on the life of Alexander Hamilton reviewed IEI's written work and stated, "After reading just nine pages, I am already dismayed by how many errors there are, some of them quite glaring." The expert said that it would take him "many, many hours to check the script against my book," and that the "script is going to need a lot of work." Hamilton Ex never received a usable narrative script from Defendants.

IEI said that it would provide a list of artifacts by March 16, 2018 and April 30, 2018, but did not meet those deadlines. Over the following months, Hamilton Ex and DKD repeatedly followed up with IEI about the items, but IEI did not respond. When IEI did send its list of artifacts, it was historically inaccurate, incomplete, and unusable. Hamilton Ex also learned that a custodian of an identified artifact did not trust Defendants with it.

As a result, Hamilton Ex engaged a replacement production company, two project managers, a script writer, a creative director, and a new lighting designer, and spent additional funds on creative design assistants and a historical consultant to redo IEI's work.

Defendants represented that they had a full staff of capable draftspersons to design schematics of the Exhibition. However, IEI did not have a full staff of draftspersons and needed to engage an outside engineering firm for help. That firm was terminated due to its subpar work product and unresponsiveness. Defendants also represented that it would not be necessary to hire an architect for the Exhibition because IEI was well-versed in design compliance. However, retention of a licensed architect became necessary for guidance on ADA compliance and emergency egress plans.

Throughout 2017, Defendants repeatedly told Hamilton Ex that they had all but secured a deal with the Chicago Museum of Science and Industry as the venue for the Exhibition. On or about May 11, 2017, Mr. Zaller wrote to Hamilton Ex, "I met with MSI Chicago this week and they remain very interested and want to get a terms sheet done and lock in the opening date." However, Hamilton Ex was informed in November of 2017 that no deal was in place or close to being in place, and that the Chicago Museum of Science and Industry was unsure about whether

the Exhibition aligned with its mission. As a result, Hamilton Ex found an alternative venue on Northerly Island in Chicago, which significantly increased the cost of the Exhibition.

At the outset of the project, Defendants represented that the Exhibition could be produced on a budget of $6 million. For several months, Hamilton Ex requested that IEI provide a detailed and itemized breakdown of the budget, but IEI did not provide one. After Northerly Island was chosen as the Exhibition's venue, the budget increased to $8 million. Defendants repeatedly assured Hamilton Ex that its design for the Exhibition would fit within that new budget.

As a result of Defendants' actions, the cost to complete the Exhibition increased and the opening of the Exhibition was delayed, causing millions of dollars in damages to Hamilton Ex.

DISCUSSION

On a motion to dismiss under Rule 12(b)(6), the court accepts all factual allegations in the complaint as true, and draws all reasonable inferences in the plaintiff's favor. Kelly-Brown v. Winfrey, 717 F.3d 295, 304 (2d Cir. 2013). To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

Count I: Fraud

"To prove common law fraud under New York law, a plaintiff must show that (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance." Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank, 57 F.3d 146, 153 (2d Cir. 1995).

Hamilton Ex alleges that it relied on Defendants' various misrepresentations about their experience, expertise, capabilities, contacts, and staff in retaining IEI as the Exhibition's production manager. Each of those representations is addressed separately below.

1. *"Defendants claimed to be experts in the production of physical exhibitions who had '25 years of diverse experience in the museum and entertainment industries' and who could 'take broad concepts and translate them into concrete realities.'" Compl. ¶ 15.*

"[R]epresentations constituting 'mere opinion or puffery' are 'not actionable representations of fact.'" Greenberg v. Chrust, 282 F. Supp. 2d 112, 120 (S.D.N.Y. 2003) (quoting Reich v. Mitrani, 701 N.Y.S.2d 368, 369 (N.Y. App. Div. 2000)).

"'Puffing' has been described as making generalized or exaggerated statements such that a reasonable consumer would not interpret the statement as a factual claim upon which he or she could rely." U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co., No. 12 Civ. 6811, 2013 WL 791462, at *6 (S.D.N.Y. Mar. 5, 2013) (citation and internal quotation marks omitted).

Defendants' general statements that they are experts at producing exhibitions and can "take broad concepts and translate them into concrete realities" are non-actionable statements of puffery and opinion about their expertise. See Gregory v. ProNAi Therapeutics Inc., 297 F. Supp. 3d 372, 399 (S.D.N.Y. 2018) (holding that statements that ProNAi's "technology, knowledge, experience, and scientific resources provide [ProNAi] with competitive advantages" and that ProNAi was "a leader in developing and commercializing a broad and diverse portfolio of cancer therapies and deliver therapeutic outcomes that dramatically changed patients' lives" are puffery and not actionable) (alteration in original); Porwal v. Ballard Power Sys., Inc., No. 18 Civ. 1137, 2019 WL 1510707, at *8 (S.D.N.Y. Mar. 21, 2019) ("Defendants' statements about Broad-Ocean's 'supposed EV expertise, customer base, scale of operations and supply chain strength are inactionable puffery,' because they are 'statements about reputation' that are 'too general to cause a reasonable investor to rely upon them.'") (citations and

internal quotation marks omitted).

The statement that Defendants have 25 years of experience in the museum and entertainment industries is a representation of fact, but Hamilton Ex does not allege that it is false.

2. *"Defendants represented that IEI was able to draft the Exhibition's written content on a timely basis, including drafting an accurate Exhibition narrative script." Compl. ¶ 20. "Defendants also represented that IEI had the experience and capabilities to identify, source and authenticate historical artifacts and other objects in connection with the Exhibition." Id. ¶ 26. "Defendants represented they had a full staff of capable draftspersons for the design schematics of the Exhibition . . . ." Id. ¶ 37.*

Those representations relate to specific facts regarding the existence of a full staff of draftspersons and Defendants' abilities to deliver written content and historical objects, and thus are not mere opinion and puffery. Hamilton Ex pleads the falsity of those representations by alleging that IEI did not have a full staff of draftspersons, that IEI could not provide proper written content, that Hamilton Ex never received a usable script from Defendants, and that their work on the script and artifacts was generally late, inaccurate, and unusable. Id. ¶¶ 21-24, 31-35, 38.

Defendants argue that the representations are not actionable because they are promissory and related to future action, and are duplicative of Hamilton Ex's breach of contract claim. However, the representations are statements of present fact about Defendants' current abilities and staff. See KCG

Americas LLC v. Brazilmed, LLC, No. 15 Civ. 4600, 2016 WL 900396, at *4 (S.D.N.Y. Feb. 26, 2016) ("Representations about an entity's ability to perform under a contract are distinct from representations that the entity will perform."); Regal Custom Clothiers, Ltd. v. Mohan's Custom Tailors, Inc., No. 96 Civ. 6320, 1997 WL 370595, at *6 (S.D.N.Y. July 1, 1997) (holding that allegations that "defendants represented to Heard that they had the resources necessary to perform under the contract when in fact they knew they did not" constitute "a misrepresentation of present fact, not future intent, which was collateral or extraneous to the contract, and thus not redundant of the breach of contract claim").

Defendants also argue that Hamilton Ex does not plead fraudulent intent or reasonable reliance. The Complaint states that Defendants made the misrepresentations "to induce Plaintiff to retain Defendant IEI's services," and that Defendants knew the representations were false at the time they were made. Compl. ¶¶ 5, 17.

Hamilton Ex also alleges that "[i]n reliance on Defendants' misrepresentations, Hamilton Ex retained and paid Defendant IEI to serve as the production manager and to provide expert services in connection with the Exhibition." Id. 18. Hamilton Ex's lack of efforts to verify the accuracy of the representations does not render its reliance unreasonable as a

matter of law. See Maloul v. Berkowitz, No. 07 Civ. 8525, 2008 WL 2876532, at *2 (S.D.N.Y. July 23, 2008) ("Whether or not reliance on alleged misrepresentations is reasonable in the context of a particular case is intensely fact-specific and generally considered inappropriate for determination on a motion to dismiss.").

However, the Complaint does not specify where or when each statement was made, and thus fails to "state with particularity the circumstances constituting fraud" as required under Rule 9(b). Fed. R. Civ. P. 9(b); see Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993) ("Specifically, the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent."). The Complaint also does not identify the speaker of the statements; it only alleges that "Defendants" made the representations, which is insufficiently precise. See id. ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants.'").[1]

[1] Hamilton Ex states in its opposition brief that "Zaller and IEI made this pitch in New York to Hamilton Ex on or about August 9, 2016, and followed up multiple times until IEI was hired in October 2016." Pl. Br. at 5 n.1. However, "it is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss." O'Brien v. Nat'l Property Analysts Partners, 719 F. Supp. 222, 229 (S.D.N.Y. 1989). Furthermore, Hamilton Ex's brief does not identify which defendant made each representation.

3. *Defendants "represented that it would not be necessary to hire an architect for the Exhibition because IEI was well-versed in design compliance." Compl. ¶ 41.*

Hamilton Ex argues that representation was false because Hamilton Ex later needed to retain an architect.

"Under New York case law, Edmiston's claim appears to constitute 'an expression of opinion rather than fact' which '[a]s a matter of law . . . cannot form the basis of a claim of misrepresentation.'" Schwartz v. Newsweek, Inc., 653 F. Supp. 384, 389-90 (S.D.N.Y. 1986) (quoting George Backer Management Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 220 (1978)) (omission in original). Although the phrase "it would not be necessary to hire an architect" on its own could be interpreted as an opinion about the necessity of an architect, Defendants' representation as a whole is a statement of fact regarding IEI's expertise and ability to perform design compliance tasks that an architect would perform.

Nevertheless, the Complaint does not satisfy Rule 9(b) because it does not specify the speaker of the statement or where and when it was made.

4. *"Throughout the course of 2017, Defendants repeatedly represented to Hamilton Ex that Defendant had all but secured a deal with the Chicago Museum of Science and Industry." Compl. ¶ 46.*

Because Defendants made those representations in 2017, after Hamilton Ex retained IEI in 2016 (id. ¶ 2), Hamilton Ex

could not have relied on them in deciding to retain IEI as the production manager, and thus cannot base a fraud claim on them.

5. *"Defendants represented that the Exhibition could be produced on a budget of $6 million. Compl. ¶ 51.*

"Statements of 'prophecy and prediction of something which it is merely hoped or expected will occur in the future' are not actionable." Dooner v. Keefe, Bruyette & Woods, Inc., 157 F. Supp. 2d 265, 278 (S.D.N.Y. 2001) (quoting Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 408 (1958)). "A representation with respect to an 'unreckonable future phenomenon . . . in circumstances that could neither be foreseen with certainty nor controlled with precision' is too 'heavily freighted with prophecy, speculation and chance" to support a cause of action for fraud.'" Id. (omission in original) (quoting Burgundy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corp., 379 N.Y.S.2d 873, 879 (N.Y. App. Div. 1976)).

That representation is a prediction of future events; it is not a false representation of an existing fact. A budget is known to be an estimate that cannot be foreseen with certainty. See id. at 277-78 (dismissing fraud claim based on the representation "that the IPO was a 'sure thing' despite knowing that the IPO would not occur" because the claim was "based entirely on representations with respect to uncertain future events" rather than "a material false representation of an

existing fact," and "[t]he fulfillment of plans for an IPO is never a certainty").

Accordingly, Hamilton Ex's fraud claim is dismissed, but with leave to replead facts that satisfy Rule 9(b) and support an inference that Defendants made false statements of fact.

Count II: Negligent Misrepresentation

> Under New York law, the elements for a negligent misrepresentation claim are that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment.

Hydro Investors, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 20 (2d Cir. 2000). "A special relationship can arise where the defendant either (1) possesses 'unique or specialized expertise' or (2) occupies a 'special position of confidence and trust' with the injured party." EED Holdings v. Palmer Johnson Acquisition Corp., 387 F. Supp. 2d 265, 281 (S.D.N.Y. 2004) (quoting Kimmell v. Schaefer, 89 N.Y.2d 257, 263 (1996)).

There are no allegations that there was a special relationship, or any relationship at all, between the parties when Defendants made the alleged misrepresentations about their capabilities and experience. Defendants were brought in to "pitch" or interview for the role as the Exhibition's production

manager; they did not occupy a position of confidence and trust with Hamilton Ex at the time.

Hamilton Ex's negligent representation claim is dismissed.

Count III: Breach of Contract

"Under New York law, the elements of a breach of contract claim are (1) the existence of an agreement; (2) adequate performance of the contract by the plaintiff; (3) breach of contract by the defendant; and (4) damages." Swan Media Grp. Inc. v. Staub, 841 F. Supp. 2d 804, 807 (S.D.N.Y. 2012). "A breach of contract claim will be dismissed, however, as being 'too vague and indefinite,' where the plaintiff fails to allege, in nonconclusory fashion, 'the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated.'" Highlands Ins. Co. v. PRG Brokerage, Inc., No. 01 Civ. 2272, 2004 WL 35439, at *8 (S.D.N.Y. Jan. 6, 2004) (quoting Sud v. Sud, 621 N.Y.S.2d 37, 38 (N.Y. App. Div. 1995)).

The Complaint does not contain facts alleging the existence or terms of any contract between Hamilton Ex and IEI or Mr. Zaller, either written or oral. The only mention of a contract is, "Defendant IEI agreed to perform certain services identified above. Plaintiff paid consideration for those services. Defendant IEI failed to perform those services and therefore breached its agreement with Plaintiff." Compl. ¶¶ 70-72. That is

insufficient and does not identify the agreement's essential terms, such as the duration of the contract, the services to be performed, or the amount of payment. See Herman v. Duncan, No. 17 Civ. 3325, 2019 WL 2137335, at *9 (S.D.N.Y. May 16, 2019) ("Terms fixing duration, payment, and the parties' obligations are central to the formation of any contract.").

Hamilton Ex argues that its complaint alleges that the parties reached an oral agreement that Defendants would provide services such as drafting a narrative, sourcing historical artifacts, preparing design schematics, and securing a venue. Pl. Br. at 19-20. However, the Complaint only mentions those services in the context of Defendants' misrepresentations about their abilities (compl. ¶ 16); it does not allege that those services make up the terms of an oral contract.

> Under the New York Statute of Frauds,
> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime.

Zaitsev v. Salomon Bros., 60 F.3d 1001, 1003 (2d Cir. 1995). Hamilton Ex does not allege the duration of the contract and whether it can be performed within one year, so it is unclear whether New York's statute of frauds applies and whether an oral contract is valid.

Hamilton Ex's breach of contract claim is dismissed without prejudice and with leave to replead facts supporting an inference that there was a valid agreement between the parties.

Count IV: Unjust Enrichment

Hamilton alleges that it paid IEI in excess of $250,000, that IEI failed to perform the work for which it was hired, and that IEI kept money that it should have used for expenses.

"Under New York law, '[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.'" Valley Juice Ltd., Inc. v. Evian Waters of France, Inc., 87 F.3d 604, 610 (2d Cir. 1996) (quoting Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 388 (1987)). "However, New York courts allow a plaintiff to defer making an election of remedies and damages in cases 'where there is a dispute over the existence, scope, or enforceability of the putative contract.'" Aero Media LLC v. World Healing Center Church, Inc., No. 12 Civ. 5196, 2013 WL 2896856, at *2 (S.D.N.Y. June 11, 2013).

As Hamilton Ex does not sufficiently allege the existence of a valid and enforceable contract, it may be able to recover its excess payments to IEI under an unjust enrichment theory. See id. (denying motion to dismiss unjust enrichment claim because "depending on whether it is able to recover under the

contract, Cross may be entitled to submit its unjust enrichment claims to a jury" and "[a]t this stage of the proceedings, it is premature to dismiss those claims").

Defendants' motion to dismiss the unjust enrichment claim is denied.

CONCLUSION

Defendants' motion to dismiss the complaint (Dkt. No. 11) is granted in part and denied in part. The motion to dismiss the fraud claim (Count I), the negligent representation claim (Count II), and the breach of contract claim (Count III), are granted, with leave to amend. The motion to dismiss the unjust enrichment claim (Count IV) is denied.

So ordered.

Dated: New York, New York
June 11, 2019

Louis L. Stanton

LOUIS L. STANTON
U.S.D.J.